

DEC 23 1991

No. 91-655

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In The
Supreme Court of the United States

October Term, 1991

THE PEOPLE OF THE STATE OF MICHIGAN,

vs

Petitioner,

DONALD WATKINS,
CHRISTIAN PHILLIPS,
MICHAEL HUNTER,

Respondents.

BRIEF FOR RESPONDENT PHILLIPS
IN OPPOSITION TO PEOPLE OF THE STATE OF MICHIGAN
PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN

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COUNTER-STATEMENT OF QUESTION PRESENTED

SHOULD THIS COURT GRANT PETITIONER'S CERTIORARI WHEN CONSISTENT PRECEDENT BY THIS COURT, AS ESTABLISHED IN *IDAHO v. WRIGHT*, *LEE v. ILLINOIS*, *CRUZ v. NEW YORK*, AND *RICHARDSON v. MARSH*, HOLDING THE CONFRONTATION CLAUSE OF UNITED STATES CONSTITUTION DENIED USE OF NONTESTIFYING CO-DEFENDANTS' UNREDACTED STATEMENTS AS SUBSTANTIVE EVIDENCE, WAS PROPERLY APPLIED IN THE DECISION OF THE MICHIGAN SUPREME COURT?



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Statutory and Constitutional Authority:

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NOW COMES Respondent herein, Christian Phillips, by his attorney, DANIEL J. RUST, and prays that the Petition for a Writ of Certiorari to the Supreme Court of Michigan filed by the People of the State of Michigan be denied for the reasons herein stated:

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 178 Mich App 439; 442 NW 2d 201 (1989) and is appended as Appendix A to the People's Petition for a Writ of Certiorari. The opinion of the Michigan Supreme Court is reported at 438 Mich 627; — NW 2d — (1991) and is appended as Appendix B to the People's Petition for a Writ of Certiorari.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered July 17, 1989. The judgment of the Michigan Supreme Court was entered September 19, 1991. The jurisdiction of this Court is invoked under 28 USC § 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Michigan Supreme Court determined the issue to be reviewed as being whether under federal and state constitutional provisions, unredacted statements on nontestifying co-defendants were admissible and if so, could the statements be considered harmless error.

Five defendants, Phillips, Jordan, Watkins, Miller, and Hunter were tried jointly in the Recorder's Court, City of Detroit, County of Wayne, State of Michigan. During trial, the court, over objection of defense trial counsels,

permitted the prosecution to read to the jury the unredacted confessions of defendants Jordan and Miller, as substantive evidence against all defendants. None of the defendants testified at trial. All defendants were found guilty and appealed.

The Michigan Court of Appeals consolidated the appeals.

The Michigan Court of Appeals affirmed the defendants' convictions, finding the unredacted confessions of the nontestifying co-defendants were properly admitted as substantive evidence against all the defendants.

The Michigan Supreme Court granted leave to appeal for a determination of the questions of whether the trial court erred in permitting the prosecution to introduce these unredacted statements of nontestifying co-defendants and if so, whether the error was harmless.

A four-justice majority found the admitted statements did not meet the criteria necessary to overcome the requirements of the confrontation clauses of the United States Constitution Sixth Amendment and 1963 Mich. Constitution art. 1, § 20, and thus found defendants' confrontational rights were violated.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

Respondent Phillips, defendant below, submits that the issue presented by the People's Petition was correctly decided by the Michigan Supreme Court, in a decision consistent with and based on, applicable precedent decisions of this Court. Therefore, under Supreme Court Rule 16.01, this Court should decline to hear this matter.

Both the current Michigan Constitution and United States Constitution have preserved the right of confrontation by the accused of the witnesses against him.

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. Const, Am VI. The 1963 Michigan Constitution similarly provides for this right. Mich. Const. 1963, art. 1, § 20.

In cases since *Douglas v. Alabama*, 380 U.S. 415; 13 L Ed 2d 934; 85 S Ct 1074 (1965), this Court has examined the right of the accused to confront a co-defendant who has confessed, inculcating the accused.

This Court has held where the statement was not admitted but read while the accused remained mute on the stand was violative of the constitutional right of confrontation. *Douglas, supra*.

In cases where the statement was unredacted and admitted, even cautionary jury instructions were deemed ineffective because the devastating effect of the statement on the jury without the ability to cross-examine the declarant would deny the defendant the right to a fair trial. *Bruton v. United States*, 391 U.S. 123; 20 L Ed 2d 476; 88 S Ct 1620 (1968).

It has been recognized the "mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton v. Evans*, 400 U.S. 74; 27 L Ed 2d 213, 91 S Ct 210 (1970).

In other cases this Court has held that even where both defendants confess and neither testified, there must be a sufficient indicia of reliability to permit the

admission of a co-defendant's statement, because the statement is viewed with special suspicion. *Lee v. Illinois*, 476 U.S. 530; 90 L Ed 2d 514; 106 S Ct 2056 (1986).

In companion cases, this Court found the confrontation clause was not violated by the admission of a non-testifying co-defendant's confession when the confession is redacted to eliminate any reference to the co-defendant's existence and the jury is properly instructed not to consider the confession as evidence against defendant, but is not directly admissible even if defendant's own confession is admitted against him. This Court's analysis found that where more than one confession was introduced and they interlocked, there was a positive inverse proportion to devastation; the more interlocking, the more questionable its unreliability. *Richardson v. Marsh*, 481 U.S. 200; 95 L Ed 2d 176; 107 S Ct 1702 (1980); *Cruz v. New York*, 481 U.S. 186; 95 L Ed 2d 162; 107 S Ct 1714 (1987).

In 1990, this Court rejected reliance on corroborative evidence of any kind in assessing whether presumptively unreliable hearsay bears the sufficient particularized guarantees of trustworthiness, holding that the relevant circumstances included only those that surround the making of the statement. *Idaho v. Wright*, 407 U.S. —; 111 L Ed 2d 638; 110 S Ct 3139 (1990).

In the present case, Respondent Phillips did not make a statement. Two of the other four defendants did. All did not testify. The only other testimony directly linking Respondent Phillips to the crime was Bernard Payne's testimony, who gave two conflicting statements to the police, one of which corroborated the confessions. Mr. Phillips was unable to attack these statements short of taking the stand himself.

In the instant case, the Michigan Supreme Court determined that the statements lacked the sufficient indicia of reliability that made these unique and special hearsay statements unreliable, applying the criteria espoused in *Lee, supra*, as well as *Idaho, supra*.

Two Michigan justices held the statements were not harmless and should be excluded, because the reliability of the custodial confessions did not bear the particular guarantees of trustworthiness for the purposes of the confrontation clause.

Both the circumstances surrounding them as well as the substance of the confessions, according to this analysis, failed to satisfy the requirements of admissibility, even without considering their presumptive unreliability.

Two other justices found the application of the exception to hearsay statements against interest was generally inapplicable to co-defendant statements. Here, the application of the hearsay exception of a statement against interest, Michigan Rule of Evidence 804(b)(3), and the trustworthiness of the statement derived from the specific factual character of the statement itself rendered the statements inadmissible.

All four justices, while thus disagreeing on the approach to these inherently untrustworthy statements, were consistent in their opinions as to the statements violating the constitutional right of confrontation.

Respondent submits in this particular case, the Michigan Supreme Court correctly applied the decisions from *Bruton, supra*, and its progeny, finding the trustworthiness of the statements derived from the specific factual characteristic of the statements themselves, to be untrustworthy because the statements themselves, and the circumstances surrounding the making of them, were suspect.

The decision below rested on precedent consistent with that set by this Court. For those reasons, Respondent Phillips submits the present case was properly decided by the Michigan Supreme Court. This matter does not present an important question of Federal Law which requires the matter to be settled by the United States Supreme Court. Respondent Phillips respectfully prays that the Petition for a Writ of Certiorari filed by the People of the State of Michigan be denied.

CONCLUSION

It is respectfully submitted, for the reasons outlined above, that plenary review should not be granted in this case and that the Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan, filed by the People of the State of Michigan, should not be granted.

Respectfully submitted,

By: /s/ DANIEL J. RUST

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Dated: December 20, 1991